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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-770

ENVIRONMENTAL PROTECTION AGENCY,
v. *Petitioner*NATIONAL CRUSHED STONE ASSOCIATION, *et al.*,
v. *Respondents*DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
v. *Petitioner*CONSOLIDATION COAL COMPANY, *et al.*,
v. *Respondents*On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW AND JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit in *National Crushed Stone Association v. EPA* is reported at 601 F.2d 111. The opinion of that court in *Consolidation Coal Co. v. Costle* is reported at 604 F.2d 239. The opinions below are also set forth at pages 1a-37a and 40a-78a of the Government's Petition for a Writ of Certiorari.

We agree with the statement concerning this Court's jurisdiction set forth at page 2 of the Petitioners' Brief.

STATUTES AND REGULATIONS INVOLVED

Pertinent portions of the Act and Title 40 of the Code of Federal Regulations are set forth in Appendix A to the Government's Brief, at pages 1a-6a.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Whether the variance provision contained in regulations prescribing "presumptively applicable" industry-wide effluent limitations promulgated pursuant to the Clean Water Act¹ by the United States Environmental Protection Agency (EPA) and based upon application of the "best practicable technology currently available" (BPT), 33 U.S.C. §§ 1311(b)(1)(A), 1314(b)(1) (1976), must allow some consideration of the variance applicant's economic capability to comply with those limitations when such variance provisions redefine BPT for a "fundamentally different" facility by reference to statutory factors including "total cost of application of technology" in relation to effluent reduction benefits?

(2) Whether the court below was correct in concluding that EPA's BPT variance provision must allow some consideration of economic capability versus effluent reduction benefits by analogy to section 301(c) of the Act?

COUNTERSTATEMENT OF THE CASE

1. The issue raised by the Government in these cases concerns the proper scope of EPA's regulations authorizing variances from industry-wide BPT effluent limitation

¹ The Federal Water Pollution Control Act Amendments (FWPCA), Pub. L. No. 92-500, 86 Stat. 816, were amended by the Clean Water Act Amendments of 1977 (CWA), Pub. L. No. 95-217, 91 Stat. 1566, and by the Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467. Hereinafter, this statute as currently amended will be referred to as the "Act" or the "Clean Water Act."

regulations. This issue results in large part from the confused and conflicting language in the Clean Water Act in which Congress attempted to implement a far reaching program for the control of water pollution. Technology based limitations on the amounts of pollutants which are discharged in effluents are a crucial element of this program.

The Act requires "*classes and categories* of [existing] point sources" to achieve such effluent limitations based on the "best available technology economically achievable" (BAT) by 1984, or in some cases, 1987, while existing "*point sources*" are required to achieve BPT limitations by 1977, or in some cases, 1979.² 33 U.S.C. §§ 1311(b)(1)(A), 1311(b)(2)(A), (C), (D), (F), 1319(a)(5)(B) (1976 & Supp. I, 1977). BPT and BAT are to be determined by reference to certain statutory factors specified respectively in sections 304(b)(1), 304(b)(2) of the Act, which also require EPA to develop BPT and BAT effluent limitations "guidelines" based on these factors for "*classes and categories* of point sources". 33 U.S.C. §§ 1314(b)(1), 1314(b)(2) (1976 & Supp. I, 1977).

However, Congress failed to explain the relationship between these EPA-promulgated section 304 guidelines and the section 301 effluent limitations. Congress also failed to explain whether EPA or the states were to establish section 301 effluent limitations, and how those

² The Act defines "point source" as:

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14) (1976).

limitations are to be applied through permits issued under the National Pollutant Discharge Elimination System (NPDES) established by section 402 of the Act, 33 U.S.C. § 1342 (1976). Finally, Congress did not explain why section 301 BPT limitations were to be established for "point sources", while BAT limitations were to be established for "classes and categories of point sources". See *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 116-21 (1976).

Early in EPA's implementation of the Act, these ambiguities in congressional intent coalesced to form one crucial question: whether specific, numerical BPT and BAT effluent limitations were to be developed and applied by EPA through promulgation of nationally uniform, industry-wide regulations, or whether EPA was instead only to provide general guidance through section 304(b) guidelines to NPDES permit issuers who would then set specific effluent limitations in individual permits on the basis of these guidelines. Given Congress' failure to answer this question, its resolution was left to the courts.

2. In *duPont v. Train*, 541 F.2d 1018 (1976), the United States Court of Appeals for the Fourth Circuit interpreted the Act as allowing EPA to promulgate regulations establishing specific BPT and BAT effluent limitations regulations which are "presumptively applicable" to classes and categories of existing point sources. However, that court also held that this presumption may be rebutted by a particular facility in an application for a variance from these nationally uniform, industry-wide regulations. *Id.* at 1028. The Fourth Circuit in *duPont v. Train* rested its conclusion that industry-wide BPT effluent limitation regulations must contain variances in part on the fact that the Act explicitly provided in section 301(e), 33 U.S.C. § 1311(e) (1976), for case-by-case flexibility in applying 'class and category' BAT limitations to specific point sources. Section 301(e) authorizes

EPA to modify the industry-wide BAT limitations when a discharger demonstrates to EPA that it is employing the "maximum use of technology within [its] economic capability" and that the modified BAT limitations "will result in reasonable further progress toward the elimination of the discharge of pollutants". 541 F.2d at 1028 (citing 33 U.S.C. § 1311(c) (1976)). However, while the Fourth Circuit determined that a variance provision was a necessary component of a regulatory scheme which rested on nationally uniform BPT effluent limitation regulations, it declined to discuss the appropriate scope of such a variance provision because, at the time, EPA's administration of its variance provision regulations was a "matter of speculation." 541 F.2d at 1028.

On review of the Fourth Circuit's *duPont v. Train* decision, this Court held that the second-stage BAT limitations were clearly to be promulgated by EPA as nationally uniform, industry-wide regulations. *duPont*, 430 U.S. at 126-27, 136. The Court then held, for various reasons, that it would be incongruous for the 1977 BPT limitations to be established by a process different from that used to establish BAT limitations. 430 U.S. at 127-28. Thus, by analogy to EPA's more obvious statutory authority to promulgate industry-wide BAT limitations, this Court in *duPont* agreed with the Fourth Circuit³ that "the statute authorizes the 1977 BPT limitations as well as the BAT limitations to be set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations." 430 U.S. at 128 (emphasis added). In reaching these conclusions, this Court noted and discussed section 301(e), the Act's

³ Except for reversing the Fourth Circuit's holding that variances are required for new as well as existing sources, this Court in *duPont* affirmed "all other aspects" of the Fourth Circuit's decision. 430 U.S. at 139.

express provision for modifying industry-wide BAT limitations on economic capability grounds. 430 U.S. at 127 n.17. And in a footnote, this Court agreed with the Fourth Circuit that "consideration of whether EPA's [BPT] variance provision has the proper scope would be premature." 430 U.S. at 128 n.19.⁴

3. Subsequent to its *duPont v. Train* decision, the Fourth Circuit addressed the scope of BPT variance provisions in three decisions, including the two now before this Court for review.⁵ Each of these decisions involved essentially the same variance provision, but EPA's interpretation of that provision changed considerably from the first to the last two.

⁴ In its opinion in *duPont*, this Court also clarified the ambiguous relationship between section 304(b) effluent limitation guidelines and section 301 effluent limitations by allowing EPA to combine promulgation of section 304(b) guidelines, which "survey the practicable or available pollution-control technology for an industry and assess its effectiveness," with the Agency's promulgation of section 301 effluent limitations, which "determine the effluent limitations for particular plants." See 430 U.S. at 130-32.

⁵ Prior to this Court's *duPont* decision, three Circuits in addition to the Fourth upheld EPA's authority to promulgate single-number, industry-wide, BPT effluent limitation regulations which included variance provisions. See *American Paper Inst. v. EPA*, 543 F.2d 328, 335-38 (D.C. Cir. 1976), cert. dism'd, 429 U.S. 967 (1976); *American Petroleum Institute v. EPA*, 540 F.2d 1023, 1030-33 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977); *Natural Resources Defense Council v. EPA*, 537 F.2d 642 (2d Cir. 1976). The Third Circuit rejected both this industry-wide, single-number approach and EPA's variance provision as being too inflexible. See *American Iron & Steel, Inst. v. EPA*, 526 F.2d 1027, 1046-47 (3rd Cir. 1975). However, none of these courts reached any holding as to the proper scope of a BPT variance provision.

The first of these decisions was *Appalachian Power Co. v. Train*, 545 F.2d 1351 (1976), in which the Fourth Circuit set aside as "unduly restrictive" a BPT variance provision for the steam electric power generating point source category which contained essentially the same language as the variance provision later remanded by that court in the *Crushed Stone* and *Consolidation Coal* decisions. Compare *Appalachian Power* at 1358-60 with *Crushed Stone*, 601 F.2d at 122 and *Consolidation Coal*, 604 F.2d at 243-44. Prior to the *Appalachian Power* decision, EPA had interpreted its BPT variance provision as being limited only "to considerations of technical and engineering factors," and as precluding any consideration of other factors specified by section 304(b)(1)(B) of the Act such as non-water quality environmental impact and "total cost" in relation to effluent reduction benefits. See *Appalachian Power*, 545 F.2d at 1359-60. The Fourth Circuit rejected this interpretation and held, *inter alia*, that both section 304(b)(1)(B) and section 301(c) of the Act demonstrated that cost considerations were relevant to BPT variance requests. 545 F.2d at 1359-60.

Subsequent to the *Appalachian Power* decision, EPA engaged in a rather convoluted series of actions through which it ultimately arrived at its current interpretation in these cases of its standard BPT variance provision. First, in rejecting an application for a BPT variance filed by a member of the pulp-paper industry, EPA stated that BPT variances must be based "on fundamental differences in factors which are appropriate to technology-based regulations and limitations derived through the variance process must still meet the congressional definition of best practicable technology currently available." *In re Louisiana-Pacific Corp.*, 10 ERC 1841, 1851 (Sept. 15, 1977). Second, in response to the Fourth Circuit's remand in *Appalachian Power*, EPA promulgated a new BPT variance provision applicable only to

steam electric power plants which "would allow the [NPDES] permit issuers to consider significant cost differentials and other economic factors applicable to the particular source involved." 43 Fed. Reg. 8813 (March 3, 1978). Third, on October 17, 1978, EPA finally withdrew its original interpretation of its standard BPT variance provision which limited the scope of that provision to consideration of only technical and engineering factors. It was this interpretation which the Fourth Circuit had struck down in *Appalachian Power* as being "unduly restrictive." See *Crushed Stone*, 601 F.2d at 123. Finally, on June 7, 1979, EPA promulgated regulations governing its NPDES permit program that contained a BPT variance provision which explicitly includes consideration of all of the factors contained in section 304(b)(1)(B) of the Act, including the "cost of compliance with required control technology." 40 C.F.R. § 125.31(d)(6), 44 Fed. Reg. 32950. However, the Agency interprets this consideration of "cost" to preclude any examination of the "discharger's ability to pay for the required waste treatment." 40 C.F.R. § 125.31(e)(3), 44 Fed. Reg. at 32951. See generally 44 Fed. Reg. 32893-94 (explanatory preamble).

4. The Fourth Circuit in *Crushed Stone* and *Consolidation Coal* did not hold that BPT variances *must* be granted to any facility which cannot afford to comply with industry-wide BPT effluent limitation regulations. Indeed, the court below specifically rejected EPA's assertion that *Appalachian Power* required the Agency to grant variance requests based only on a plant's economic inability "to comply with the national BPT limitation." 601 F.2d at 123. On the contrary, the Fourth Circuit in *Crushed Stone* only held that if a facility "is doing all that the maximum use of technology within its economic capability will permit *and* if such use will result in reasonable further progress toward the elimination of the

discharge of pollutants," it should be given a BPT variance "should it comply with any other requirements of the variance." 601 F.2d at 124 (quoting *Appalachian Power*, 545 F.2d at 1378) (emphasis in the original).⁶

In *Consolidation Coal*, the Fourth Circuit, citing its *Crushed Stone* decision, remanded EPA's BPT variance provision for the coal mining point source category. 604 F.2d at 243-244. In directing EPA to revise that provision in conformity with *Crushed Stone* and *Appalachian Power*, the court in *Consolidation Coal* noted the industry petitioners' argument that BPT variances must allow consideration of all section 304(b)(1)(B) and 301(c) factors. 604 F.2d at 243-44.

5. The Government attempts to convince this Court that the position urged by respondents would create a "loophole" designed to exempt from control marginal plants that cannot survive with the additional costs imposed by BPT limitations. See Petitioners' Brief at 23, 27, 30-35. Because the Government places such stress on

⁶ The Fourth Circuit in *Crushed Stone* relied on its previous holding in *Appalachian Power* that EPA must consider not only "the statutory factors set out in" section 301(c) when ruling on a variance request, but also those factors set out in section 304(b)(1)(B) of the CWA. *Appalachian Power*, 545 F.2d at 1359-60. The *Appalachian Power* court also explained that "[i]n requiring that EPA give weight to the relevant statutory factors in developing a subsequent variance provision, we in no way intend to imply that EPA's regulations must provide for a detailed cost-benefit analysis at the permit granting stage." 545 F.2d at 1360 n.23. Instead,

an overall cost-benefit analysis for each category or sub-category satisfies the mandate of § 304 in this regard. The variance provision should, however, allow the permit issuer to consider significant cost differentials of the particular point source involved.

545 F.2d at 1360 n. 23.

this issue, we wish at the outset to state clearly our position. We do not contend that a plant should be entitled to a BPT variance simply because it is financially troubled. Higher "total costs" than those assumed by EPA in establishing its BPT regulations for a particular industry do not occur in a vacuum. Rather, they are normally the result of tangible factors—the age of equipment and facilities involved, the process employed, engineering and process factors, energy and other requirements. At the same time, the fact that a particular discharger is not economically capable of installing the required control technology which EPA has determined the industry in general is capable of installing may well place that discharger in a position that is "fundamentally different" from others in the industry. The inquiry, however, does not stop here. Rather, in redefining BPT for a facility that is "fundamentally different", the permit issuer must consider all of the statutory factors, including the "total cost" of various treatment alternatives considered. If an alternative is so expensive that it would bankrupt the plant, then the economic consequences of forcing the plant to close is part of the "total cost" in relation to effluent reduction benefits that should be considered along with the other statutory factors in determining BPT for the plant.

SUMMARY OF ARGUMENT

BPT variances were not specifically addressed by Congress in the 1972 amendments to the FWPCA. Instead, they were required by this and other Courts to preserve EPA's authority to promulgate presumptively applicable nationally uniform, industry-wide BPT limitation regulations. EPA's industry-wide BPT limitations do not adequately take into account facilities whose characteristics are "fundamentally different" from the assumptions on which EPA bases those industry-wide BPT limitations. Thus, an adequate BPT variance is an essential

part of the Agency's effluent limitations regulatory program.

Given EPA's interpretation of its BPT variance provision as including all of the factors contained in section 304(b)(1)(B), consideration of the economic capability of the discharger to meet the presumptively applicable BPT effluent limitations regulations must be relevant to BPT determinations. EPA interprets its BPT variance provision as allowing limitations based on BPT to be defined for anomalous facilities at the NPDES permit issuing stage, and therefore admits that all factors relevant to its determination of industry-wide BPT limitations are relevant to BPT variance determinations. These factors, set out in section 304(b)(1)(B) of the Act, include the "total cost of application of technology" in relation to effluent reduction benefits. Congress clearly defined "total cost" to include some consideration of economic impact or capability. Since economic capability is a relevant consideration when EPA is developing industry-wide BPT limitations, it must also be relevant to BPT variance determinations because these determinations are, according to EPA, based on the same section 304(b)(1)(B) factors.

Since EPA's authority to promulgate industry-wide BPT limitations is derived by analogy to its authority to develop industry-wide BAT limitations, economic capability is also a relevant consideration in BPT variance determinations by analogy to section 301(c) of the Act. Section 301(c) of the Act allows industry-wide BAT limitations to be modified for a facility upon a demonstration that it is doing all within its economic capability and is achieving a reasonable further progress in reducing pollutant discharge. This required demonstration is analogous to and consistent with the balancing of "total cost" (including economic impact or capability) and effluent reduction benefits in BPT variance determinations.

EPA's insistence that the express language of section 301(c) renders it inapplicable to BPT variances misses the point. The court below never literally applied section 301(c) to the BPT variance provision. Instead, it only referred to section 301(c) to determine what economic "tests" or "considerations" were appropriate in applying the "total cost" factor in section 304(b)(1)(B) in the context of a BPT variance determination. This reference to section 301(c) for guidance is analogous to this Court's reasoning in *duPont* that Congress' express provision for uniform BAT regulations sustained an implication of EPA's authority to promulgate industry-wide BPT limitations. Any other interpretation would result in BAT limitations being more flexible than BPT limitations, even when those limitations are identical. The court below did not hold that a BPT variance must be granted to any facility which cannot afford the industry-wide BPT limitations. Instead, it held only that the balance between cost, including economic capability, and pollutant reduction benefits is always one factor appropriate to BPT variance determinations.

The legislative history of the 1977 Amendments to the Act supports the reasoning of the court below. Congress was aware of judicially sanctioned BPT variances at the time it was considering the 1977 amendments. Yet it did not eliminate them. Congress was also aware of the Fourth Circuit's *Appalachian Power* decision, which required consideration of economic capability in BPT variance determinations. Yet Congress never criticized or overruled that decision despite its express rejection of other decisions. On the contrary, there is evidence that Congress agreed with the Fourth Circuit BPT variance provision holding in *Appalachian Power*. Moreover, one of the primary goals of the 1977 Amendments to the Act was to render the effluent limitations regulatory scheme more flexible, and this flexibility is one of the functions served by the BPT variance required by the court below.

The decisions below do not require EPA to determine economic impact on a plant-by-plant basis. EPA need only examine a discharger's demonstration of total cost, including economic impact, versus effluent reduction benefits at its facility. There is no evidence that this comparison would burden EPA any more than determining fundamental differences at the applicant's facility in other pertinent factors set forth in section 304(b)(1)(B).

EPA's interpretation of the appropriate scope of the BPT variance provision is not entitled to deference by the Court. EPA's interpretation has been inconsistent, is not longstanding, and conflicts with actual Agency practice. Moreover, EPA's interpretation also conflicts with statutory language and the relevant legislative history, and it has never been sanctioned by Congress. Finally, EPA's interpretation of its BPT variance provision is internally inconsistent and unreasonable.

ARGUMENT

I. A VARIANCE PROVISION THAT INCLUDES CONSIDERATION OF ECONOMIC CAPABILITY IS REQUIRED BY THE LANGUAGE AND STRUCTURE OF THE ACT

A. The Function of the BPT Variance Provision

BPT variance provisions were not specifically addressed by Congress when it drafted the 1972 Amendments to the Act. Instead, they were recognized by this and other courts both as a necessary concomitant of EPA's authority to promulgate nationally uniform, industry-wide BPT effluent limitations,⁷ and as a mechanism required

⁷ See, e.g., *duPont*, 430 U.S. at 127-28; *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031-34 (D.C. Cir. 1978). Others besides the courts have recognized the critical role that a

to ensure that the variety among facilities within an industry is adequately addressed at some point because that variety is often not addressed by EPA's industry-wide limitations. *See NRDC v. EPA*, 537 F.2d at 647.⁸

Indeed, it would be unrealistic to expect EPA's industry-wide BPT effluent limitations regulations to reflect fundamental differences among plants given the manner in which they are developed. For example, EPA did not add the costs of all individual coal mines, crushed stone, or construction sand and gravel facilities in arriving at

meaningful variance provision plays in the BPT regulatory scheme. For example, in testimony before the Subcommittee on Environmental Pollution in 1977, the Natural Resources Defense Council (NRDC) testified that "a fundamental variance provision" was integral to the Act's system of "national, uniform, minimum effluent limitations." *See Federal Water Pollution Control Act Amendments of 1977, Hearings before the Subcommittee on Environmental Pollution of the Senate Comm. on Environment and Public Works, 95th Cong., 1st Sess., Series 9-H25, Part 9*, at 37 (1977). Despite this Court's holding in *duPont* that such variances are a prerequisite to EPA's promulgation of industry-wide BPT limitations for a particular category of dischargers, the Government nevertheless questions in its Brief "whether EPA need grant any variances from the 1977 limitations at all." Petitioners' Brief, at 25.

⁸ As EPA itself pointed out in its BPT variance provisions for the coal mining and crushed stone industries, its industry-wide BPT limitations may not address the fundamental differences among plants within these industries. In relevant part, these variance provisions state that:

In establishing the limitation set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors . . . which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been avail-

its "total cost" estimate for these industries. Instead, the Agency utilized certain fictional "model plants" employing all the required treatment technologies to develop its industry-wide cost estimates.⁹ Thus, an adequate BPT variance provision is crucial if fundamental differences among real plants, including fundamental differences in their "total cost," are to be adequately addressed at some stage in the limitation setting process.¹⁰ Such a provision does not constitute a "loophole" through which individual facilities may escape BPT compliance. On the contrary, it redefines BPT for those "fundamentally different" individual facilities whose operations are not accurately reflected by the assumptions underlying EPA's industry-wide BPT limitations.

Hypothetically, other devices could accomplish the same purpose. EPA could elaborately subcategorize every industry so that only genuinely similar facilities are subject to the same BPT limitations.¹¹ However, totally accurate

able and, as a result, these limitations should be adjusted for certain plants in this industry.

40 C.F.R. §§ 434.22, .32, .42 (1979) (coal mining category); 40 C.F.R. §§ 436.33, .43 (1979) (mineral mining and processing category).

⁹ See, e.g., EPA Development Document for Coal Industry at 183, 186, Appendix A at A-3, A-4; EPA's Economic Impact Report for the Mineral Mining and Processing Industry at I-4 to I-6, Appendix B at B-1 to B-3.

¹⁰ The Agency has expressly acknowledged the limitations on its economic models:

"To a certain extent, each plant in the industry is a special case. The use of a model facility cannot take such specificity into account."

See Appendix B at B-3.

¹¹ For example, the D.C. Circuit in *Weyerhaeuser* pointed out that in developing effluent limitations for the "bleached"

subcategorization of a very large, diverse industry would undoubtedly strain EPA's resources far more than processing an occasional variance request at the NPDES permit stage. For example, surface and underground coal mines and coal preparation plants are in operation in virtually every major region of the country and are, therefore, subject to a variety of climatic, hydrological and geologic conditions. These varying background conditions determine not only volume and constituents of waste water discharges, but also the type and degree and therefore the cost of treatment required.¹² Similarly, there are more than 4,800 crushed stone facilities which range in size from less than 25,000 tons/year to 15 million tons/year annual production. The volume of contamination by pollutants at a particular quarry is dependent on site specific precipitation patterns, geological features, mine layout and topography. The construction sand and gravel industry is equally diverse, since it encompasses more than 5000 facilities located throughout the country, ranging in size from under 25,000 tons per year to over 1 million tons per year annual production. The amount of process water used by these facilities, and its contamination, depends on the type of raw material, the amount of impurities and fines present, and

paper industry, EPA identified 16 different categories, divided into 66 subdivisions, resulting in one set of limitations for every 5 mills. As the *Weyerhaeuser* Court noted, "This extensive subdivision safeguarded against overzealous standards, increased the confidence that can be placed in the practicability of the regulations, and diminished the need to handle variation through the variance process. 590 F.2d at 1053 (emphasis added); cf. *duPont*, 430 U.S. at 131 n.21. (Court stresses use of subcategorization to support diversity.)

¹² See Appendix A at A-2 to A-3.

the customer's specifications, all of which vary from plant to plant.¹³

Totally accurate subcategorization of such large and diverse industries would be extremely difficult. Therefore, for these and other similarly situated industries, a BPT variance provision that allows for consideration of fundamental differences between an individual discharger and the hypothetical or "average" discharger on which the BPT limitations regulations were based is crucial if only genuinely similar plants are to be subject to similar effluent limitations.

Analysis of the Act and its legislative history demonstrate that such provisions must provide for consideration of all of the statutory factors relevant to determining BPT. One of these factors is the "total cost" to the facility of meeting the nationally uniform regulations, including the economic capability of the facility to install necessary control equipment.

B. The BPT Variance Provision Must at Least Allow Consideration of All Factors Contained in Section 304(b)(1)(B), and These Factors Include Economic Capability

Since the function of a BPT variance is to determine BPT at an individual facility, all factors relevant in setting industry-wide BPT limitations must also be relevant under the BPT variance. *Weyerhaeuser*, 590 F.2d at 1034-36; *Appalachian Power*, 545 F.2d at 1359-60; see

¹³ See, e.g., EPA Development Document for the Mineral Mining and Processing Industry, Appendix C at C-5, C-6. EPA did not even attempt to survey all of the plants in the mineral mining industry or mines in the coal mining industry that would be subject to the industry-wide BPT effluent limitations regulations. There are over 4800 crushed stone plants, according to EPA, but the Agency visited only 41 and had data for only 189, less than 5 percent of the industry. See Appendix C at C-2 to C-4.

United States Steel Corp. v. Train, 556 F.2d 822, 844-47 (7th Cir. 1977). EPA itself has agreed with this inevitable conclusion. *Compare Petitioners' Brief*, at 19-20 with 43 Fed. Reg. 50042 (Oct. 26, 1978). Given universal agreement that BPT variance provisions at least include consideration of all statutory industry-wide BPT factors, one must ascertain congressional intent as to the precise nature of these statutory BPT factors in order to make a determination of the variance provision's proper scope.

These factors clearly include "total cost" since section 304(b)(1)(B) requires EPA to consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." 33 U.S.C. § 1314(b)(1)(B) (1976).¹⁴ The legislative

¹⁴ During the House debate on the 1972 FWPCA Conference Committee Report, Representative Wright emphasized congressional intent that best "practicable" technology was to be defined by reference to all the section 304(b) factors, including "total cost":

The conference report utilizes the term "practicable" in section 301(b)(1)(A) in the requirements for effluent limitations which must be achieved by July 1, 1977. There are set out in section 304(b)(1)(B), which relates to section 301(b)(1)(A), a number of factors relating to the assessment of "best practicable control technology currently available." This includes consideration of the total cost of application of technology in relation to the effluent reduction to be achieved from such application, nonwater quality environmental impact, and energy requirements.

A Legislative History of the Water Pollution Control Act Amendments of 1972, Congressional Research Service, Library of Congress, Ser. No. 93-1 (Jan. 1973) (hereinafter referred to as 1972 Leg. Hist.), Vol. 1, at 259-60 (emphasis added).

history of the 1972 Amendments to the Act defined the phrase "total cost" contained in section 304(b)(1)(B) as those

*internal, or plant, costs sustained by the owner or operator and those external costs such as potential unemployment, dislocation and rural area economic development sustained by the community area, or region*¹⁵

Despite this unambiguous definition of "total cost," the Agency at least in these cases still argues that its required cost considerations during BPT variance proceedings need encompass *no* consideration of the variance applicant's ability to afford those industry-wide BPT limitations. *See, e.g.*, Petitioners' Brief, at 2, 11, 17, 19, 22-24.¹⁶

Contrary to the Government's arguments, however, Congress unambiguously defined "total cost" not only to include the individual owner or operator's "internal, or plant costs," but also "external costs" such as "unemployment" and "dislocation".¹⁷ Only by surveying the economic

¹⁵ [1] 1972 Leg. Hist. at 231 (Rep. Jones explaining FWPCA Conference Rep. on House floor).

¹⁶ According to EPA, BPT variances will now be granted upon a showing that

the plant's own compliance costs with the national guideline limitation would be X times greater than the compliance costs of the plants EPA considered in setting the [1977 limitations].

Petitioners' Brief at 11 (quoting 43 Fed. Reg. 50042 (Oct. 26, 1978)). In contexts other than the cases now before this Court for review, however, EPA has apparently agreed that BPT variance provisions must encompass economic capability considerations. Text, *infra* at 39-41.

¹⁷ One must note the importance of Representative Jones' statement as to congressional intent underlying the term "total cost". Not only was he Floor Manager during the House

capability of the plants which make up the industry in question, can EPA consider costs in terms of unemployment and social dislocation in determining what constitutes best "practicable" technology. During oversight hearings on the 1972 Amendments to the FWPCA, Representative Wright reemphasized congressional intent that the statutory term "practicable" encompassed economic capability considerations:

[T]he word "practicable" encompasses technology, it encompasses economics, it encompasses local circumstances, *it encompasses the capability of a given plant or industry to perform to a given level without incurring such severe financial loss that it would have to curtail its operations and result in unemployment.*¹⁸

Thus, the economic capability of affected facilities to install required pollution control technology is clearly relevant in setting industry-wide BPT limitations under section 304(b)(1)(B) of the Act. Consequently, it must also be a relevant consideration under EPA's BPT variance provision since, as EPA has stated, that provision must include consideration of all industry-wide BPT

debate on the 1972 Amendments, but he also is frequently cited in the Government's Brief as an authority on Congress' intent as to the Act. See Petitioners' Brief, at 31, 34.

In 1977, Congress also stressed the importance of "total costs" in determining BPT limitations for depressed industries. A Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Control Act, Congressional Research Service, Library of Congress, Ser. No. 95-14 (Oct. 1978) (1977 Leg. Hist.), Vol. 4, at 1314.

¹⁸ Hearings on the Implementation of the Federal Water Pollution Control Act Before the Subcom. on Investigations and Review of the House Comm. on Pub. Works, 93d Cong., 2d Sess. 490 (1974) (emphasis added).

factors. *Appalachian Power*, 545 F.2d at 1359; see *United States Steel*, 556 F.2d at 845-46 & n.42; cf. *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 301 (3rd Cir. 1977) (court approves EPA procedure for comparing general BPT cost estimates with "total (including site-specific) costs of reporting plants").

The D.C. Circuit's opinion in *Weyerhaeuser*, upon which both the Government and NRDC rely, must be read as reaching this same conclusion if that opinion is to be internally coherent. In *Weyerhaeuser*, the court concluded that

[a]lthough the "total cost" of pollution control at the petitioning mill must be considered under a satisfactory variance provision, it is only relevant "in relation to the effluent reduction benefits to be achieved" at that mill, section 304(b)(1)(B); *so long as those costs relative to the pollution reduction gains are not different from those that may be imposed on the industry as a whole, the difficulty, or in fact the inability, of the operator to absorb the costs need not control the variance decision.*

590 F.2d at 1036 (footnote omitted) (emphasis in the original).¹⁹

¹⁹ In construing Congress' definition of "total cost," the D.C. Circuit in *Weyerhaeuser* concluded that "[u]nder this definition certain economic factors must be considered but they need not be decisive if associated with commensurate pollution-ending gains, and they do not, *without more*, include the fact that the operator is experiencing difficulty in, or is unable to absorb the costs." 590 F.2d at 1036 n.35 (emphasis added). This statement is only consistent with other aspects of the *Weyerhaeuser* opinion if one interprets it as requiring a fundamental difference between the variance applicant's cost/effluent reduction benefit ratio and that which was established by EPA for the entire industry. Under *Weyerhaeuser*, this fundamentally different cost/benefit ratio would be necessary

Implicit in this passage from the *Weyerhaeuser* opinion is the conclusion that when the variance applicant's ratio of "total cost" (including economic capability) to effluent reduction benefits is "different" from that which could have been imposed by the relevant industry-wide BPT limitations, then the applicant's "difficulty" or "inability" to afford those limitations may "control the variance decision." Thus, although the Government cites the *Weyerhaeuser* opinion at numerous points in its Brief, e.g., Petitioners' Brief, at 24 n.19, 25, 29, the D.C. Circuit's analysis does not support the Government's position that it need not, and, in fact, cannot ever consider economic capability in determining BPT variance requests.

On the contrary, *Weyerhaeuser* is generally consistent with the Fourth Circuit's opinions on most aspects of this total cost issue.²⁰ Both courts agree that EPA must consider an individual operator's "total cost." Both courts also agree that BPT variances should not be granted simply because an individual operator cannot afford to install industry-wide BPT limitations. Instead, an individual operator's economic ability to comply with industry-wide BPT limitations is only one component of a "total cost" calculation which in turn must be balanced against effluent reduction benefits. Compare 590 F.2d at 1036 with *Crushed Stone*, 601 F.2d at 123-24. And both courts also acknowledge the relevance of BPT variance provision factors other than this total cost/effluent re-

to trigger some consideration of economic capability. Compare 590 F.2d at 1035-36 with 590 F.2d at 1039 nn.38-39, 1040.

²⁰ Indeed, at numerous points in its *Weyerhaeuser* opinion, the D.C. Circuit cited the Fourth Circuit's *Appalachian Power* opinion with approval. See 590 F.2d at 1036 n.35, 1038, 1039 n.38.

duction benefit comparison. Compare 590 F.2d at 1035 n.34, 1040 with 601 F.2d at 124 and 545 F.2d at 1359-60.

C. The Factors Set Forth In Section 301(c) of The The Act are By Analogy Relevant to BPT Variance Determinations

This Court in *duPont* upheld EPA's authority to promulgate industry-wide BPT limitations only by analogy to its more obvious statutory authority to promulgate industry-wide BAT limitations, which are subject to modifications on grounds including economic capability balanced against effluent reduction benefits.²¹ The Fourth Circuit in its earlier opinion in *duPont v. Train* had reached this same conclusion by a similar analysis. Crucial to the Fourth Circuit's *duPont v. Train* holding on this point were: (i) EPA's authority under Section 301(c) to modify BAT limitations; and (ii) that court's conclusion that "the 'best practicable control technology' for 1977 may not be construed more stringently than the 'best available technology economically achievable' as ameliorated by the qualification of § 301(c) for [BAT] limitations." 541 F.2d at 1028.

First in *Appalachian Power* and subsequently in *Crushed Stone* and *Consolidation Coal*, the Fourth Circuit used this analogy to the BAT limitations in holding that any BPT variance provision must take into consideration, *inter alia*, the statutory factors set out in section 301(c). 601 F.2d at 123-24; 545 F.2d at 1359-60. The Fourth Circuit reasoned that Congress did not intend 1977 BPT limitations to be applied any more inflexibly than the second-stage BAT standards. Since the harsh inflexibility of the BAT requirements is mitigated by the economic capability consideration specified by section 301(c), economic capability should also be

²¹ Text, *supra* at 5-6.

relevant to the BPT variance.²² This same conclusion was reached by a commentator cited twice in the Government's Brief.²³

The Fourth Circuit in *Appalachian Power, Crushed Stone, and Consolidation Coal* held neither that the BPT variance provision must be identical to section 301(c), nor that section 301(c) applied "ex proprio vigore" to BPT limitations. Petitioners' Brief, at 26. Rather, it only held that section 301(c) factors should also be relevant under the BPT variance. In essence, the Fourth Circuit referred to section 301(c) to determine what economic considerations were appropriate when the permit issuer examined, in the context of a BPT variance request, the "total cost" factor contained in section 304(b) (1) (B). Nevertheless, the Government continually recites the actual text of sections 301(c) and 304(b) (2) (A)—particularly the phrases "economically achievable" and "reasonable further progress toward the elimination of the discharge of pollutants"—and argues that, by their terms, these sections render the section 301(c) factors inapplicable to BPT variances. See Petitioners' Brief, at 23-25, 27. The Government's concern with the Act's statutory language, which it had earlier described as "less than pellucid" (*id.* at 18), is curious since section

²² NRDC argues in its *amicus* brief that "Congress made the explicit economic escape valve in section 301(c) applicable only to the more costly BAT limitations." NRDC Amicus Brief, at 20. BAT limitations will not be "more costly" than BPT limitations when, as in the case of the crushed stone industry, EPA promulgates identical BPT and BAT limitations.

²³ See *Kalur, Will Judicial Error Allow Industrial Point Sources to Avoid BPT and Perhaps BAT Later? A Story of Good Intentions, Bad Dictum and Ugly Consequence*, 7 *Ecol. L.Q.* 955, 976 (1979) (cited in Petitioners' Brief at 26, 33 n.25).

301(b) (1) (A) requires effluent limitations for "point sources", not "classes and categories" of point sources. Thus, industry-wide BPT limitation regulations are only justified "as a matter of statutory language" if one analogizes to the Act's required procedures for developing 1984 BAT limitation regulations, as this Court did in *duPont*. The Act expressly allows modification of these BAT limitations through section 301(c) on grounds including a facility's inability to afford them. Consequently, by analogy, a BPT variance provision should also encompass similar considerations of economic capability. This conclusion underscores the fact that the phrase "total cost" used in section 304(b) (1) (B), applied in the context of a request for a variance from "presumptively applicable" BPT effluent limitations regulations, must include consideration of the "economic capability" of the requestor to comply with the otherwise applicable BPT effluent limitations regulations.

Finally, the Government contends that it is not required to perform any kind of cost-benefit balancing when developing BAT limitations, while only some form of industry-wide cost-benefit balancing is required for 1977 BPT limitations. According to the Government, this is the "only difference between Section 304(b) (1) (B) and Section 304(b) (2) (B)." Petitioners' Brief, at 24 & n.20. Assuming *arguendo* that this reading of the Act is correct, then one could interpret section 301(c) as expressly providing for some BAT economic capability/effluent reduction benefit balancing on the individual facility level. Under section 301(c), the amount of money which an individual facility can afford to spend on pollution control technology must be balanced against the effluent reduction benefits achieved by that level of affordable pollution control technology in order to determine whether effluent limits less stringent than industry-wide BAT limitation levels should be established for that facility. Thus, Section 301(c) provides a balancing mecha-

nism in order to relieve the onerous inflexibility of nationally uniform, industry-wide BAT regulations.

Since EPA has authority to promulgate industry-wide BPT regulations only by analogy to its authority to promulgate industry-wide BAT regulations, and since the Act expressly provides for such an economic capability/effluent reduction balancing to adjust these more rigorous, industry-wide BAT regulations, then by analogy, BPT variance provisions should allow the variance applicant to perform and submit a similar analysis.²⁴ Contrary to the Government's position, such an approach to BPT variances is buttressed by and consistent with both the Act's express requirement of some form of industry-wide BPT cost-benefit balancing and EPA's acknowledgment that all BPT industry-wide factors are relevant to its BPT variance clause.²⁵

²⁴ In *Weyerhaeuser*, the D.C. Circuit also agreed with the Fourth Circuit that this Court's *duPont* decision required EPA to "give permittees the ability to secure variances from the 1977 limitations analogous to their statutorily provided ability to secure the same with respect to the [BAT] limitations." 590 F.2d at 1034. In a footnote, the court noted that its conclusion was "somewhat different" from the Fourth Circuit's in *Appalachian Power*. Since it believed that the Act "reveals quite clearly" the relationship between section 301(c) and 1984 BAT limitations, the D.C. Circuit only insisted "that the EPA's application of the 1977 variance allowance bear a similar relationship to the factors the statute deems crucial to the development of the general 1977 limitations." 590 F.2d at 1034 n.30. This distinction drawn by the *Weyerhaeuser* court may be one 'without a difference,' because *Weyerhaeuser* can only be read as implying that, under some circumstances, the 1977 BPT "total cost" factor requires consideration of economic capability. See 590 F.2d at 1036 & n.35.

²⁵ This court's opinion in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), also supports affirmance of the decisions

II. THE DECISIONS OF THE COURT OF APPEALS ARE CONSISTENT WITH CONGRESSIONAL INTENT

A. The Legislative History of the 1977 Amendments Supports the Decisions Below Because Congress Implicitly Sanctioned Both BPT Variances and Appalachian Power

The term "variance" appears several times in the legislative history to the 1977 Amendments to the Act. In most instances, the references arose in the context of an amendment to section 309 of the Act, which authorizes EPA to extend the date for BPT compliance until April 1, 1979. 33 U.S.C. § 1319(a)(5)(B) (Supp. I, 1977). Congress intended this mechanism for extending BPT compliance time to complement, not replace BPT variance provisions. As described by Senator Muskie, this amendment to section 309 was simply an attempt to relieve the inflexible compliance date for achieving BPT limitations without adding "a new layer of review" to that

below. In *Union Electric*, this Court held, *inter alia*, that when reviewing state implementation plans under the Clean Air Act, EPA may not consider the economic feasibility of the plan's requirement since economic feasibility is not encompassed within the specific statutory assessment criteria. 427 U.S. at 256-57. Under a similar analysis, EPA must give some consideration to a BPT variance applicant's economic capability of achieving industry-wide BPT limitations because "total cost," a statutory BPT consideration factor, as defined in the Act's legislative history, encompasses consideration of economic capability. Also, Congress made economic capability a consideration in Section 301(c), and those section 301(c) factors must apply by analogy to BPT variances. Finally, one must also note the similar importance of an adequate variance provision to this Court's *Union Electric* decision. See 427 U.S. at 266-67.

already provided by existing variance provisions. *See* [4] 1977 Leg. Hist. at 861-62. In fact, the relevant legislative history of the 1977 Amendments reveals that one purpose of these section 309 amendments was to allow EPA to grant BPT compliance-time extensions to facilities that raised "legitimate issues," involving either the "required technology" or "other points," through "established" "[a]ppeal mechanisms" such as administrative variance proceedings and judicial review thereof. *See* [4] 1977 Leg. Hist. at 693-94, 861-62, 1054; [3] 1977 Leg. Hist. at 408. Thus, a facility could apply for a BPT variance and a section 309 extension of the statutory deadline for BPT compliance.²⁶

There is also no doubt that Congress in considering the 1977 Amendments was aware of the Fourth Circuit's *Appalachian Power* decision on which that court's subsequent *Crushed Stone* and *Consolidation Coal* decisions were based. In 1977, Congress rejected an amendment which would have conferred exclusive jurisdiction over the variance regulations remanded in *Appalachian Power*, and other EPA rules of nationwide impact, on the Court of Appeals for the District of Columbia Circuit. [4] 1977 Leg. Hist. at 873, 1012-29. The potential implications of passage of such an amendment on the Fourth Circuit's remand in *Appalachian Power* had been specifically brought to the attention of the Senate.²⁷

²⁶ During the debate on the House bill, Representative Bonker noted congressional intent to extend the BPT compliance deadline for "industrial dischargers who have not completed their facilities due to bona fide challenges to the EPA's effluent limitations." Among the "bona fide" challenges justifying an extension of BPT compliance time was "EPA's delay in promulgating a meaningful variance procedure." [4] 1977 Leg. Hist. at 1314.

²⁷ See Federal Water Pollution Control Act Amendments of 1977, Hearings before the Subcommittee on Environmental

Congressional awareness and approval of the *Appalachian Power* holding are also evinced by two other aspects of the legislative history of the 1977 Amendments. First, Representative Clausen, ranking minority member of the Subcommittee on Water Resources, stated during the House debate on the Conference Report to the final 1977 amendments that "[a] full understanding of Public Law 92-500 [the 1972 Amendments] can only be achieved by having an understanding of the case law interpreting the public law." [3] 1977 Leg. Hist. at 374.²⁸ At the time Representative Clausen made this statement, only the *Appalachian Power* court had addressed the proper scope of a BPT variance provision; the D.C. Circuit had not reached its decision in *Weyerhaeuser*, and the *American Petroleum* and *NRDC v. EPA* courts had declined to rule on its interpretation and application. Consequently, this passage from the 1977 CWA legislative history indicates congressional approval of the analysis of the BPT variance provision contained in *Appalachian Power*. In fact, the case law Report cited by Representative Clausen concluded that, in regard to section 301(c) BAT modifications based in part on economic capability, "the language in [this Court's] *duPont* case would seem to

Pollution of the Senate Comm. on Environment and Public Works, 95th Cong., 1st Sess., Series 9-H25, Part 9, at 17 (1977).

²⁸ At this point during the House debate, Rep. Clausen referred to a Library of Congress report on case law under the 1972 FWPCA: "Case Law Under the Federal Water Pollution Control Act Amendment of 1977, Library of Congress, Congressional Research Service, House Public Works and Transportation Committee Print 95-35 (Report). [3] 1977 Leg. Hist. at 374. This Report was prepared in September 1977, before debate on the final CWA, and discusses both *Appalachian Power* and this Court's *duPont* decision. E.g., Report at 20, 28.

mandate similar provisions for 1977 limitations." Report at 20.²⁹ Thus, consistent with *Appalachian Power* and the decisions below, Congress clearly intended EPA to consider "potential cost to individual companies" when implementing the Act.

Second, when Congress disapproved of cases interpreting the Act, it did so explicitly in the legislative history of the 1977 Amendments.³⁰ Consequently, its failure to reject the *Appalachian Power* decision can only be construed as approval and acceptance of the Fourth Circuit's analysis of the BPT variance issue in that case.

²⁹ Rep. Clausen also pointed out that

it is not the intent of this legislative effort to invest EPA with discretion in the interest of a precisely target [sic] series of regulatory activities, and then see this discretion nullified by agency shortcuts and across-the-board regulatory requirements. Constraints on agency manpower and other resources may well prove incentives to such an approach. *But it is intended that the Agency bear in mind the potential cost to individual companies, entire industries, and the economy at large to result if the act is not administered as intended by the Congress.* As reflected by the conference report on [the CWA], these concerns are prominent among those motivating this legislation. Excessive regulation in the name of administrative convenience will not be tolerated. This concern will remain uppermost in mind as the Congress continues to exercise its legislative and oversight responsibilities in this field.

[3] 1977 Leg. Hist. at 373 (emphasis added).

³⁰ See [4] 1977 Leg. Hist. at 693 (rejecting Sixth Circuit holding that some circumstances justified extension of BPT compliance time under FWPCA), 701 (rejecting Eighth Circuit holding that U.S. Corps of Engineers was exempt from State environmental law).

In general, the 1977 Amendments evince congressional intent to render the Act's effluent limitations more flexible at least in part because BPT had proven more stringent than anticipated. See [3] 1977 Leg. Hist. at 370 (House debate on Conference Report); [3] 1977 Leg. Hist. at 269 (Conference Report). Thus, although Congress did not explicitly address the BPT variance in the 1977 Amendments, its overall intent to make the Act more flexible³¹ is consistent with the Fourth Circuit's requirement that BPT variance provisions also be flexible in their scope. And Congress' failure to enact an express BPT variance provision may be traced to its implicit approval of the decisions in *duPont* and *Appalachian Power*.

Ironically, the Government devotes an entire page of its Brief to passages from the 1977 Amendments' legislative history demonstrating Congress' concern over the Act's economic impact on industry. See Petitioners' Brief, at 41. The Government then concludes on the basis of this legislative concern that Congress determined not to "provide general exemptions or extensions for the 1977 deadlines." Petitioners' Brief, at 41-42. This conclusion, of course, misses the point since as the Government admits, BPT variances are not "exemptions or extensions" from 1977 BPT requirements, but instead redefine BPT for a particular point source. And, it also ignores the basic thrust of the 1977 amendments, which

³¹ Congress' continuing desire to render the Act still more flexible is evinced by currently pending legislation which under certain circumstances would require EPA to modify or withdraw effluent limitations which threaten unemployment because of plant closings. S. 2453, H.R. 6867, 96th Cong., 2d Sess. (1980) (printed in 126 Cong. Rec. S. 2656-S. 2657 (daily ed. March 19, 1980)).

was to provide greater flexibility to the Act. *See generally* [3] 1977 Leg. Hist. at 425, 497; [4] 1977 Leg. Hist. at 1315.

Finally, the Government's contention that any consideration of economic capability during the BPT variance process "would impose a substantial burden on" the Agency and "further delay implementation of the 1977 limitations", *see* Petitioners' Brief, at 42, ignores both Congress' express satisfaction with the degree of industrial compliance with the 1977 BPT limitations³² and the probability that few BPT variances will be filed in the future because the 1977 BPT deadline is long past and point source dischargers in major industries will have to comply with BAT limitations for toxic pollutants and BCT limitations by July 1, 1984. 33 U.S.C. § 1311(b) (2)(C), (E) (Supp. I, 1977). *See generally* NRDC v. Train, 8 ERC 2120 (D.D.C. 1976), as modified, 12 ERC 1833 (D.D.C. 1979).

B. The Government Consistently Relies on Irrelevant Legislative History

In contrast to its deliberations prior to passage of the 1977 Amendments, Congress never directly addressed or considered BPT variances in drafting the 1972 Amendments to the Act, despite the Government's hyperbolic assertion that this legislative history

unequivocally shows that Congress intended EPA to set the 1977 limitations on an industry-wide basis

³² *See, e.g.*, [3] 1977 Leg. Hist., at 323, 330, 369-70, 462-63, 478. It is worth noting that, contrary to the implication given in the Government's brief, Congress in its consideration of the 1977 Amendments repeatedly criticized EPA's administration of the Act. *See, e.g.*, [3] 1977 Leg. Hist. at 377-80, 381, 385, 386, 409.

and that neither Section 304(b) (1) (B) nor Section 301(c) requires EPA to grant variances from the 1977 limitations to individual point sources in financial difficulty.

Petitioners' Brief, at 30.³³

In general, the Government's use of legislative history can be dismissed as falling into several different, but related categories of error. First, the Government cites numerous statements to the effect that Congress did not intend to exempt facilities from BPT limitations simply because they cannot afford to comply with those regulations. *See, e.g.*, Petitioners' Brief, at 28-29, 30, 34-36. The Fourth Circuit has never held, and the respondents have never argued, that a facility should receive a BPT variance simply because it cannot afford to comply with industry-wide BPT limitations. Second, the Government cites legislative history to the effect that every affected facility must achieve BPT and that it should not be modified or waived for economic reasons. *See, e.g.*, Petitioners' Brief, at 28, 31-34, 37-38. This argument misses the point. As the Government acknowledges in other sections of its Brief, the NPDES permit limitation received through a BPT variance does not "modify" BPT limitations for a particular facility; it is BPT for that

³³ Indeed, were the FWPCA legislative history so unequivocal on just the first assertion made in this passage, then this Court need not have rendered much of its *duPont* opinion. Moreover, the Government appears to have missed those parts of the legislative history of the 1972 Amendments which reflect an overall abiding concern that the cost of any pollution controls be reasonable and that the economic impact resulting from such controls be tolerable. *See, e.g.*, [1] 1972 Leg. Hist. at 231 (Rep. Jones), 350, 352 (Rep. Blatnik); [2] 1972 Leg. Hist. at 1272 (Sen. Randolph), 1281 (Sen. Bentsen). Affordability is an essential component of reasonable costs.

facility. Third, the Government cites legislative history relieving EPA from any duty to determine economic impact on a case-by-case basis. *See, e.g.*, Petitioners' Brief, at 31-34. But this discussion by the legislature was in the context of establishing industry-wide regulations and is contradicted by other portions of the FWPCA legislative history. *See duPont*, 430 U.S. at 131 n.21. Moreover, as discussed *infra* at 36-37, EPA need not perform such a case-by-case economic impact analysis in a variance proceeding because the burden is on the variance applicant to make this showing.

In addition to these categories of general error, some portions of the legislative history cited by the Government warrant specific comment. First, the Government accords great weight to a written statement Senator Muskie inserted into the record of the Senate's debate on the Conference Report on the 1972 Amendments to the Act. *See Petitioners' Brief*, at 33-34 & n.26. This statement, offered as an "explanation of each of the significant provisions of the Act," appears rather to have been an effort by the Senator to write his own gloss on agreements reached during the conference.³⁴ One commentator, noting contradictory Conference Report statements on the degree to which effluent limitations may vary with individual circumstances, observed that Senator Muskie "chose the half of the Conference Report he preferred, insisting that the modified bill provided for nationally uniform limitations based on BPT."³⁵ One portion of

³⁴ Senator Muskie's colleagues in both Houses strongly disagreed with aspects of this statement. *See, e.g.*, [1] 1972 Leg. Hist. at 105-08 (remarks of Rep. Dingell), 205 (remarks of Senator Jackson).

³⁵ Currie, "Congress, the Court and Water Pollution," 1977 S. Ct. Rev. 39, 51.

the 1972 legislative history ignored by Senator Muskie stated that

[i]n defining best practicable [technology] for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include [those listed in Section 304(b)(1)(B)]. . . . *In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant.*

[2] 1972 Leg. Hist. at 1468 (emphasis supplied).

Second, for some reason, the Government also dwells at great length on that section of the Act which established a loan fund to enable facilities to comply with its requirements. *See Petitioners' Brief*, at 28, 36-38 (citing section 8, 86 Stat. 898-99 (amending 15 U.S.C. § 636)). The Government apparently relies on a statement by Senator Nelson regarding this loan fund for the proposition that "Congress deliberately chose not to permit variances from the 1977 limitations on the ground of financial hardship." *Petitioners' Brief*, at 37. Senator Nelson's statement does not specifically address BPT variance provisions; rather, it appears to reject all economic variances from the Act's "pollution controls." Thus, Congress obviously did not agree with Senator Nelson that this loan fund was an "'alternative to . . . waiving strict environmental standards where economic hardship could be shown,'" *Petitioners' Brief*, at 37 (quoting [2] 1972 Leg. Hist. at 1355), because it expressly provided for modification of BAT limitations on economic grounds. 33 U.S.C. § 1311(c) (1976). Moreover, a BPT variance provision does not *waive* BPT limitations requirements; it redefines those requirements for an individual plant. Thus, a facility in compliance with BPT limitations granted through the variance process would be eligible

for these loans. *See generally* Petitioners' Brief, at 37-38. Also, as discussed previously, BPT variances may not be based solely on "financial hardship." Rather, economic capability is only one of a number of factors to be considered by the permit issuer in deciding on a BPT variance request. In any event, the availability of such loans merely demonstrates Congress' concern over the economic impact of its effluent limitations.³⁶

C. Consideration of Economic Capability in the BPT Variance Process Would Not Require EPA to Conduct "Plant-by-Plant" Economic Impact Determinations

The Government recites legislative history stating that EPA need only determine the economic impact of its BPT limitations on classes or categories of industrial point source dischargers, not on individual facilities. *See Petitioners' Brief*, at 30-34. This legislative history is irrelevant because it pertains only to EPA's promulgation of industry-wide BPT effluent limitations; it does not address the extent of EPA's duty in the context of a BPT variance request to consider a discharger's economic capability to comply. *See 590 F.2d at 1037 n.36.*

Moreover, this part of the Government's argument completely ignores the process by which variance requests are determined and, therefore, raises an illusory issue. At the variance stage, EPA need not itself perform a plant-specific cost-benefit analysis or any other kind of

³⁶ As stated by Rep. Harrington during the debate on this funding section of the House Report: "No one in Congress wishes to legislate so irresponsibly that we drive out of business those who sincerely wish to abide by the new pollution laws but who, because of a bad state of the economy, will be forced to close." [1] 1972 Leg. Hist. at 450.

plant-specific economic impact analysis. *Appalachian Power*, 545 F.2d at 1360 n.23. Rather, the burden is on the variance applicant to present evidence on site-specific costs. *Weyerhaeuser*, 590 F.2d at 1037 n.36. *See generally* 40 CFR §§ 125.31, 125.32, 44 Fed. Reg. 32950-51 (June 7, 1979). The variance mechanism will be triggered only where the applicant can show a fundamental difference between it and the rest of the industry. Thus, EPA need only consider the evidence submitted by the applicant and compare it to the industry-wide cost-benefit comparison and other economic analyses already performed by the Agency in its rulemaking.³⁷ This approach to the variance process would not "place [the] impossible burden on EPA," which this Court strove to avoid in *duPont*. *See generally* 430 U.S. at 132. It is worth noting, in this regard, that the Government has not even presented this Court with the number of BPT variance requests which EPA has received.

Finally, as discussed previously, "total cost," including economic capability to comply, is only one factor relevant to a BPT variance determination. Other factors specified in section 304(b)(1)(B) may also warrant a BPT variance. Determination of fundamental differences with respect to these other factors could also be complicated and time consuming. Yet EPA admits that its variance must encompass those other factors and has not complained about the burden such determinations would place on it.

³⁷ Cf. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C. Cir. 1973) (EPA has no affirmative duty to make a quantified cost-benefit analysis under the Clean Air Act but must consider such studies when submitted by companies), cert. denied, 417 U.S. 921 (1974).

III. THE AGENCY'S CONSTRUCTION OF THE PROPER SCOPE OF A BPT VARIANCE PROVISION IS NOT ENTITLED TO DEFERENCE

Only an Agency's consistent, long-standing, and substantially contemporaneous construction of a statute is entitled to "considerable" weight by a reviewing court. See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 718-19 (1975). And even when these conditions are met, the Agency's construction is "not controlling." 422 U.S. at 719. "[I]t is only one input in the interpretational equation," and "[i]ts impact carries more weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings." *Zuber v. Allen*, 396 U.S. 168, 192 (1969) (citations omitted) (emphasis added); accord, *SEC v. Sloan*, 436 U.S. 103, 117-21 (1978). Thus, deference to the Agency's construction of a statute is inappropriate when that construction is not longstanding, see *Teamsters v. Daniel*, 439 U.S. 551, 565-66 (1979), and any deference is always "constrained" by the court's "obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Id.* at 566 n.20.

Contrary to statements in the Government's Brief, EPA has not consistently provided a "well articulated" interpretation of the BPT variance provision required by this Court's reading of the Act. On the contrary, it has repeatedly changed its view as to the proper scope of the provision.³⁸ After several permutations, EPA finally agrees with the court below that its variance provision must encompass all section 304(b)(1)(B) factors, including "total cost." Yet the Agency, at least in these cases, still ignores Congress' unambiguous intent that

³⁸ See generally text, *supra* at 6-8.

"total cost" include some consideration of economic capability. EPA's claims about its "consistent" construction of the proper scope of its BPT variance provision are rendered even more unreliable by the fact that, until the Government filed its brief on the merits of this case, EPA had argued to this Court that this issue was not ripe for judicial review.³⁹

The interpretation of EPA's BPT variance provision put forward in the Government's brief also conflicts with prior Agency practice. For example, in *United States Steel*,⁴⁰ during administrative proceedings whose "proper inquiry" was whether a BPT variance was warranted, EPA presented and assessed evidence on, *inter alia*, the cost to a particular steel works of complying with industry-wide BPT limitation regulations. 556 F.2d at 844-46. In considering the costs of these regulations, EPA both compared their resulting capital costs to the facility's entire capital replacement costs and determined daily operating costs associated with meeting the regula-

³⁹ Until now, EPA argued that the proper scope and application of a BPT variance provision could not be determined by a court without reference to the record established in an actual variance proceeding. See Government Petition for a Writ of Certiorari, at 3, 20-21; Respondents' Brief, *Consolidation Coal v. Costle*, at 16-20. Indeed, EPA had unsuccessfully petitioned the Fourth Circuit to recall its mandate in *Appalachian Power* after this Court's *duPont* decision on the grounds that determination of its variance provision's proper scope would be speculative except in the context of an actual variance application. See No. 74-2096, Order of Sept. 26, 1977.

⁴⁰ EPA relies on *United States Steel* for its authority to set case-by-case NPDES permit limitations. See 44 Fed. Reg. 38763 (column 3) (July 2, 1979). This case and EPA's conduct of the variance proceedings at issue in this case were also noted with approval in the 1977 amendments' legislative history. See [4] 1977 Leg. Hist. at 862.

tions. 556 F.2d at 846 n.42. On the basis of these and other considerations, EPA determined the industry-wide BPT limitations to be "feasible" for that particular facility. 556 F.2d at 846. There is no discussion in *United States Steel* of the proposition that this plant's compliance costs/effluent reduction benefits ratio must be "fundamentally different" from the entire industry's before a variance could be granted, and EPA's actual reassessment of this plant's ability to comply with the industry-wide limitations can only be characterized as encompassing some consideration of whether the plant can afford those regulations, *i.e.*, whether those industry-wide regulations are economically "feasible" for that particular plant.

Moreover, in processing an actual BPT variance request by the Jones & Laughlin Steel Corporation, EPA commissioned a financial consultant "to analyze the financial capability of Jones & Laughlin Steel Corporation . . . to afford BPT treatment facilities at its Aliquippa and Pittsburgh works."⁴¹ Finally, EPA's reliance on legislative history stating that it is not required "to determine the economic impact of controls on any individual plant in a single community,"⁴² conflicts not only with its actual practice in the *United States Steel* and Jones & Laughlin proceedings, but also with its general interpretation of the BPT variance provision as requiring a variance if "a discharger . . . could show that given its unique location and circumstances, adherence to the 1977

⁴¹ See Written statement of Robert L. Hayes, TCS Financial Consultants, on behalf of the United States Environmental Protection Agency concerning the financial capabilities of the Jones & Laughlin Steel Corp., at 3 (March 30, 1979), in Appendix D at D-1.

⁴² Petitioners' Brief, at 34 (quoting [1] 1972 Leg. Hist. at 170) (emphasis in the original).

limitations would be substantially more expensive . . . than compliance by other members of the same industry." Petitioners' Brief, at 10-11.

Finally, there is no indication either that EPA has ever presented its interpretation of this provision to Congress or that Congress has ever agreed with the Agency's interpretation. However, as demonstrated *supra*, there is evidence in the legislative history to the 1977 CWA amendments that Congress was aware of and approved the Fourth Circuit's holding in *Appalachian Power* that BPT variance provisions must allow some consideration of economic capability.

CONCLUSION

For the foregoing reasons the decisions below should be affirmed in all respects.

Respectfully submitted,

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APPENDICES

APPENDIX A

EPA 440/1-76/057-a

Development Document for Interim Final Effluent
Limitations Guidelines and New Source Performance
Standards for the

COAL MINING

Point Source Category

[EPA SEAL]

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY

May 1976

SECTION V

WASTE CHARACTERIZATION

The nature and quantity of pollutants discharged in waste water from surface and underground coal mining operations and coal preparation facilities varies significantly throughout the United States. The waste water situation evident in the mining segment of the coal industry is unlike that encountered in most other industries. Usually, most industries utilize water in the specific processes they employ. This water frequently becomes contaminated during the process and must be treated prior to discharge. In contrast, water is not utilized in the actual mining of coal in the U.S. at the present except for dust allaying and fire protection. Waste water handling and management is required in most coal mining methods or systems to insure the continuance of the mining operation and to improve the efficiency of the mining operation. Water enters mines via precipitation, groundwater infiltration, and surface runoff where it can become polluted by contact with materials in the coal, overburden material and mine bottom. This waste water is discharged from the mine as mine drainage which may require treatment before it can enter into navigable water. The waste water from coal mining operations is unrelated, or only indirectly related, to production quantities. Therefore, raw waste loadings are expressed in terms of concentration rather than units of production.

In addition to handling and treating mine drainage during actual coal loading or coal production, coal mine operators are faced with the same burden during idle periods. Waste water handling problems are generally insignificant during initial start-up of a new under-

ground mining operation. However, these problems continue to grow as the mine is expanded and developed and, unless control technology is employed may continue indefinitely as a pollution source after coal production has ceased. Surface mines can be somewhat more predictable in their production of waste water pollutants. Waste water handling within a surface mine can be fairly uniform throughout the life of the mine. It is highly dependent upon precipitation patterns and control technology employed, i.e.: use of diversion ditches, burial of toxic materials, and concurrent reclamation. Without the use of control measures at surface mines the problems of waste water pollution would also grow and continue indefinitely after coal production has ceased.

*Cost For Treating Coal Mine Discharges as Supplied to
EPA Water Economic Branch*

The 40 CFR 434 established four subcategories for the industry:

- Subpart A—Coal Preparation Plant Subcategory;
- Subpart B—Coal Storage, Refuse Storage and Coal Preparation Plant Ancillary Area Subcategory;
- Subpart C—Acid or Ferruginous Mine Drainage Subcategory;
- Subpart D—Alkaline Mine Drainage Subcategory.

For the purpose of making an economic analysis of the impact to the coal mine industry for meeting the additional limitations required by the court order of December 16, 1975 (NRDC vs Train, Civ. Dkt. No. 1609-73) establishing additional limitations for the coal mining point source category the industry was segmented into model mines and preparation plants. These models were

supplied by the contractor who is preparing the draft economic analysis. (See Figure 41) A complete copy of this report is available through EPA Public Information Reference Unit, Room 2922 (EPA Library) Waterside Mall, 401 M Street, S.W. Washington, D.C.

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* * *

The selected approach for costs, cost factors and costing methodology for the model mine segments provided entailed the derivation costs for the various facilities and activities which, in combination, form the specified treatment processes. Where practical and applicable, the costs are shown as a function of variables which are generally known for specific mining operations (e.g. daily flow rate, size of impoundment area, amount of flocculant added per volume of waste water).

APPENDIX B
ECONOMIC IMPACT
OF
EFFLUENT GUIDELINES

MINERAL MINING
AND PROCESSING INDUSTRY

Construction Sand and Gravel
Crushed Stone
Industrial Sand
Phosphate Rock

U.S. Environmental Protection Agency
Office of Water Planning and Standards
Washington, D.C. 20460

[I-4]

* * *

The impact in each industry segment is analyzed by means of a model plant which describes the financial structure (revenues, normal operating costs, capital employed, net revenues, etc.) and the control costs required to meet the guideline standard. The model plants are used to estimate the impact for each segment. The following six levels of impact are analyzed:

1. *Price Effects*—the segment is analyzed in terms of competitive structure, price elasticity, availability of substitutes, etc., all of which will determine the ability of the plants in the segment to pass on the increased costs of operation;
2. *Financial Effects*—the expected shift in net revenues and capital requirements are analyzed to estimate the [I-5] number of plants in the segment which would be expected to close;

3. *Production Effects*—the impact of expected closures on production in the segment is analyzed;
4. *Employment Effects*—the employment impact of plant closures is assessed from the anticipated closures;
5. *Community Effects*—any expected employment or income loss because of plant closures is analyzed for its adverse impact on the region in which the closing plants are located; and
6. *Balance of Trade Effects*—a substantial shift in production or prices could hamper exports and/or encourage imports. Any such events would impact the nation's balance of trade. Most of the industries produce relatively low-value products that are not a significant part of the nation's foreign trade. Only phosphate rock has any potential impact on balance of trade.

The application of a general analysis to the specific problems of those industries is not without limitations. This study has attempted to recognize the limitations and to make assumptions that would overstate adverse economic impact generated by the imposition of the effluent guidelines.

7. *Industry Growth Effects*—any expected change in the projected industry growth rate is assessed from the impact of expected closures, which incorporates the expected shift in net revenues, capital requirements, and prices.

[I-6]

One of the principal limitations of the analysis is that the natural-resource base industries' costs of operations and control will depend on the specific site for each plant.

To a certain extent, each plant in the industry is a special case. The use of a model facility cannot take such specificity into account. Thus, the actual financial situation and control costs for any given plant may be different from the model used to represent it.

In many cases, information on the exact numbers of plants in each required analytical segment has not been available. Therefore, estimates were made as to the numbers of firms in each segment and those estimates are a significant factor in determining the expected economic impact.

All these limitations must be considered in light of the results. Very little adverse economic impact is anticipated; so small, in fact, that a doubling or tripling of impact would not make the national aggregate impact significant. However, each plant closure causes a significant adverse impact for its employees and potentially for the community that loses the jobs and incomes generated by the plant.

APPENDIX C

**DEVELOPMENT DOCUMENT
FOR THE
MINERAL MINING AND PROCESSING INDUSTRY**

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Project Officer**

July 1977

**Effluent Guidelines Division
Office of Water and Hazardous Materials
U.S. Environmental Protection Agency
Washington, D.C. 20460**

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[12]

TABLE 2
DATA BASE

Subcategory	No. Plants	No. Plants		
		Visited	Data Available	Sampled
Dimension Stone	194	20	20	5
Crushed Stone	4,800			
Dray		5	52	*
Wet		26	130	9
Flotation	8	2	3	1
Shell Dredging	50	4	4	0
Construction Sand				
Gravel				
Dry	750	0	50	*
Wet	4,250	46	100	15
Dredging (on-land)	50	8	15	0
Dredging (on-board)	100	3	25	0
Industrial Sand				
Dry	20	0	5	*
Wet	130	3	10	2
Flotation	17	4	10	2
Acid Leaching	3	3	3	0
Flotation (HF)	1	1	1	1
Gypsum				
Dry	73	5	54	2
Wet Scrubbing	5	1	8	1
HMS	2	1	2	*
Asphaltic Minerals				
Limestone	2	0	2	*
Bituminous				
Oil Impreg.				
Diatomite	1	1	1	*
Gilsonite	1	1	1	1
Asbestos				
Dry	4	2	4	1
Wet	1	1	1	*
Woolastonite	1	1	1	*

* There is no discharge of process waste water in the subcategories under normal operating conditions.

C-3

TABLE 2—Continued
DATA BASE

Subcategory	No. Plants	No. Plants		
		Visited	Data Available	Sampled
Lightweight Aggregates				
Perlite	13	4	4	*
Pumice	7	2	7	
Vermiculite	2	2	2	*
Mica & Sericite				
Dry	7	5	7	*
Wet	3	2	3	*
Wet Beneficiation	7	5	7	*
Barite				
Dry	9	4	8	*
Wet	14	7	14	*
Flotation	4	3	4	1
Fluorspar				
HMS	6	4	6	*
Flotation	6	4	5	2
Drying and Pelletizing	2	1	2	*
[13]				
Salines from Brine				
Lakes	3	3	3	*
Borax				
Potash				
Trona Ore				
Phosphate Rock				
Eastern	22	21	20	5
Western	6	6	6	2
Rock Salt				
Rock Salt	21	11	15	3
Sulfur				
Anhydrite	2	1	2	*
On-Shore	9	7	9	5
Off-Shore	2	1	1	1
Mineral Pigments				
Lithium Minerals				
Lithium Minerals	2	2	2	2

* There is no discharge of process waste water in the subcategories under normal operating conditions.

Table 2—Continued

DATA BASE

Subcategory	No. Plants	No Plants		
		Visited	Data Available	Sampled
Sodium Sulfate	6	2	2	*
Bentonite	37	2	2	*
Fire Clay	81	9	9	*
Fuller's Earth				
Attapulgite	10	4	5	2
Montmor.	4	3	3	3
Kaolin				
Dry		4	4	*
Wet	37 total	6	7	0
Ball Clay	12	4	4	0
Feldspar				
Wet	5	5	5	5
Dry	2	2	2	*
Kyanite	3	2	2	*
Magnesite	1	1	1	*
Shale and Common Clay	129	10	20	*
Aplite	2	2	2	*
Talc Minerals				
Dry	27	12	20	*
Washing	2	1	2	*
HMS, Flotation	4	4	4	4
Natural Abrasives				
Garnet	3	2	2	0
Tripoli	4	2	4	*
Diatomite	9	3	3	*
Graphite	1	1	1	0
Misc. Minerals				
Jade	est. 10	1	1	*
Novaculite	1	1	1	*
Total	11,019	312	735	77

* There is no discharge of process waste water in the subcategories under normal operating conditions.

[18]

* * * * *

The crushed stone industry is widespread and varied in size of facilities and types of material produced. The size of individual firms varies from small independent producers with single facilities to large diversified corporations with 50 or more crushed stone facilities as well as other important interests. Facility capacities range from less than 22,700 kkg/yr (25,000 tons/yr) to about 13.6 million kkg/yr (15 million tons/yr). As Table 5 shows only about 5.2 percent of the commercial facilities are of a 816,000 kkg (900,000 ton) capacity or larger, but these account for 39.5 percent of the total output. At the other extreme, facilities of less than 22,700 kkg (25,000 ton) annual capacity made up 33.3 percent of the total number but produce only 1.3 percent of the national total. Geographically, the facilities are widespread with all States reporting production. In general, stone output of the individual States correlates with population and industrial activity as shown by Figure 2. This is true because of the large cost of shipment in relation to the value of the crushed stone.

[24]

* * * * *

The crushed stone and sand and gravel industries, on the basis of tonnage are the largest nonfuel mineral industries. Because of their widespread occurrence and the necessity for producing sand and gravel near the point of use, there are more than 5,000 firms engaged in commercial sand and gravel output, with no single firm being large enough to dominate the industry. Facility sizes range from very small producers of pit-run material to highly automated permanent installations capable of supplying as much as 3.6 million kkg (4 million tons) yearly of closely graded and processed products; the average commercial facility capacity is about 108,000

kkg/yr (120,000 tons/yr). As seen from Table 7 about 40 percent of all commercial facilities are of less than 22,600 kkg (25,000 tons) capacity, but together these account for only 4 percent of the total commercial production. At the other extreme, commercial operations with production capacities of more than 907,000 kkg (1 million tons) account for less than 1 percent of the total number of facilities and for 12 to 15 percent of the commercial production.

APPENDIX D

WRITTEN STATEMENT OF

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ON BEHALF OF THE

United States Environmental Protection Agency
concerning the financial capabilities of the
Jones & Laughlin Steel Corporation

March 30, 1979

[3]

* * * *

SCOPE OF THE ANALYSIS

I have been requested by EPA to analyze the financial capability of Jones & Laughlin Steel Corporation (J&L) to afford BPT treatment facilities at its Aliquippa and Pittsburgh works.

* * * *